Supreme Court, U.S.
FILED
DEC 2 1980
MICHAEL RODAK, JR., CLERK

Nos. 80-594 and 80-605

In the Supreme Court of the United States

OCTOBER TERM, 1980

AMERADA HESS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

KAYO OIL COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

SANFORD M. LITVACK
Assistant Attorney General

JOHN J. POWERS, III
FREDERIC FREILICHER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-594

AMERADA HESS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

No. 80-605

KAYO OIL COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the indictment should have been dismissed because of preindictment delay where the district court found that the alleged delay was not intentional and did not prejudice petitioners.

2. Whether petitioners' Sixth Amendment right to be informed of the nature and cause of the accusation was violated.

3. Whether petitioners were deprived of a fair trial by the publication of an accurate newspaper account of the decision in a civil antitrust case involving a co-defendant who was ultimately acquitted by the jury.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Duignan v. *United States*, 274 U.S. 195	4
Husty v. *United States*, 282 U.S. 694	4
Lawn v. *United States*, 355 U.S. 339	4
United States v. *Andrews*, 381 F.2d 377, cert. denied, 390 U.S. 960	9
United States v. *Flom*, 558 F.2d 1179	9
United States v. *Lovasco*, 431 U.S. 783	4, 6
United States v. *Marion*, 404 U.S. 307	5

Constitution and statute:

United States Constitution, Sixth Amendment	6
Sherman Act, Section 1, 15 U.S.C. 1	1

OPINIONS BELOW

The opinion of the court of appeals on rehearing (Pet. App. 1a-29a)[1] is reported at 624 F.2d 461. The memorandum and order of the district court denying the motion to dismiss the indictment (Pet. App. 29a-43a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1980. A petition for rehearing was denied on August 5, 1980. On September 30, 1980, the Chief Justice extended the time for filing the petitions for a writ of certiorari to and including October 14, 1980, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioners were convicted of a price fixing conspiracy, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.[2] They

---

[1] "Pet. App." refers to the appendix in No. 80-605.

[2] In addition to petitioners, four corporations, the Society of Independent Gasoline Marketers of America (SIGMA), Ashland Oil, Inc., Continental Oil Company, Crown Central Petroleum, and four individual defendants, Robert R. Cavin, Norman Goldberg, Charles J. Luellen, and W. H. Burnap, were charged. Cavin was convicted, but the other individual defendants were acquitted by the court at the conclusion of the government's case. SIGMA and Ashland were convicted, but Crown Central and Continental were acquitted by the jury.

were each fined $50,000. These convictions were affirmed by the court of appeals (Pet. App. 1a-29a).[3]

The evidence at trial showed that petitioners engaged in a conspiracy to coordinate price increases, eliminate discounts, and settle price disputes in the Middle Atlantic States (Pet. App. 5a, 8a). The agreement to fix prices was proved through the testimony of numerous witnesses, many of whom were employees of the various defendants, and supported by the defendants' own contemporaneous records (*id.* at 8a). These witnesses testified, and various records confirmed, that petitioners and others communicated with each other on a continuing basis in order to maintain prices in local markets at stable levels approximately two cents per gallon below the prices charged by the so-called "major brand" stations. See, *e.g.*, J.A. 257, 260, 271-272, 275, 282-286, 580-582, 604-606, 609, 2090-2094, 2102, 2875-2876.[4] To implement this agreement, petitioners and others not only coordinated price changes but negotiated to end price wars among themselves. See, *e.g.*, J.A. 257, 580-582, 604-606, 2090-2094, 3112.

2. In affirming petitioners' convictions (Pet. App. 6a-9a),[5] the court of appeals held that "the evidence was sufficient to support the conclusion of the jury that the defendants were working together for the accomplishment of their common purpose to fix prices

---

[3] The convictions of Cavin and Ashland were reversed for reasons unrelated to the questions presented in these petitions (Pet. App. 9a-25a).

[4] "J.A." refers to the joint appendix in the court of appeals.

[5] An earlier opinion of the court of appeals, affirming Ashland's conviction as well as petitioners', was withdrawn on petition for rehearing, and the instant opinion was substituted (see Pet. App. 3a).

within the geographical area described in the indictment" (*id.* at 8a). The court also rejected petitioners' claims that the court's instructions varied from the indictment and that the proof varied from the indictment, the bill of particulars and the pretrial stipulation of the parties (*id.* at 8a-9a). Finally, in light of the government's "extensive disclosure" of its case prior to trial, the court held that the district court did not abuse its discretion in denying petitioners' request for a more detailed bill of particulars (*id.* at 9a).

ARGUMENT

1. Petitioners contend (Kayo Pet. 14-22; Hess Pet. 11) that the court of appeals should have dismissed the indictment because of an "unreasonable" preindictment delay caused by the government's "gross negligence." This contention is based primarily on the fact that in 1968 or 1969 a Justice Department attorney was given a tape recording of remarks made during a meeting of SIGMA, an industry trade association, including a speech by Howard Teak, then SIGMA's executive director (Pet. App. 30a). Petitioners contend that the tape recording should have alerted the government to their illegal activities, yet the indictment was not returned until June 1, 1976. This contention does not warrant review by this Court.

At the outset, we note that petitioners did not raise the issue of preindictment delay in the court of appeals, except in a very oblique fashion.[6] The court of

---

[6] Petitioners' 197-page joint brief in the court of appeals did not list preindictment delay as an issue presented for review (J.B. 2). There was no separate discussion of the issue nor of any of this Court's decisions on preindictment delay. In the course of their argument that the tape record-

appeals did not discuss the question. It is well established that this Court will not ordinarily review questions not presented to or decided by the court of appeals. See *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958); *Husty* v. *United States*, 282 U.S. 694, 701-702 (1931); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). Review would be particularly inappropriate here because this Court has left "to the lower courts, in the first instance, the task of applying the settled principles of due process [concerning preindictment delay] to the particular circumstances of individual cases." *United States* v. *Lovasco*, 431 U.S. 783, 797 (1977).

In any event, petitioners' claim is without merit. The district court carefully considered the question of preindictment delay and correctly rejected it in an opinion on which we rely (Pet. App. 29a-43a). The court found from the evidence before it that the attorney to whom the Teak tape was given apparently never listened to the tape or turned it over to others prior to his retirement (*id.* at 37a). Thus, an investigation into petitioners' price fixing was not begun until after a private antitrust action was filed against Crown Central in 1973 (*id.* at 33a). The court concluded that the delay in returning the indictment after the delivery of the tape was unintentional—"at best a negligent delay unaccompanied by any improper motivation" (*id.* at 37a). With respect to the shorter delay between the filing of the civil suit and the empanelling of the grand jury, the district court found that it was justified by the government's understand-

---

ing should not have been admitted, however, petitioners did discuss the alleged delay in filing the indictment (J.B. 133-135; see Kayo Pet. 14 n.15).

able desire to see if the plaintiffs could carry their burden in a civil suit before framing criminal charges (*id.* at 38a-39a). Finally, apart from any justifications for the delay, the court ruled that the defendants had not shown that they were prejudiced by the delay (*id.* at 40a-42a).[7]

Under the decisions of this Court in *United States* v. *Lovasco*, *supra*, and *United States* v. *Marion*, 404 U.S. 307 (1971), it is clear that the district court correctly ruled that the indictment should not be dismissed because of preindictment delay. In the absence of a showing of actual prejudice, the indictment should not be dismissed. See *United States* v. *Marion*, *supra*, 404 U.S. at 325-326. Moreover, the district court's finding that the delay was "at best negligent" is not clearly erroneous. Indeed, even if the tape had been heard by government attorneys in 1969, petitioners would have no basis for complaint. Petitioners have characterized Teak's remarks as "sometimes incoherent and always ambiguous" (Pet. 20); thus they should not be heard to complain that

---

[7] Petitioners alleged that they were prejudiced because of Teak's death in 1972. The court observed that the record of Teak's activities was "amply preserved" because the persons with whom he communicated on pricing could be called as witnesses (Pet. App. 41a). As for the death of other possible SIGMA witnesses, there was "no showing that they could have offered exculpatory evidence not merely cumulative of that which the many witnesses who are alive may offer" (*ibid.*). Lastly, the district court rejected petitioners' claim that they were prejudiced by their claimed destruction of documents. The court was "highly skeptical that documents of such importance would be destroyed by companies of [petitioners'] size and sophistication" (*id.* at 42a). The court concluded that no "meaningful impairment of [petitioners'] ability to defend themselves appears" (*ibid.*).

the government was "grossly negligent" in not instituting a prosecution immediately after being furnished with the tape recording. See *United States* v. *Lovasco, supra,* 431 U.S. at 791.

2. Petitioners contend (Kayo Pet. 22-28; Hess Pet. 11) that they were not informed that the prosecution would introduce evidence of local price fixing incidents and thus that their Sixth Amendment right to be informed of the nature and cause of the accusation against them was denied. The court of appeals flatly rejected this contention, finding that "the charges and specifications found within the four corners of the indictment, the bill of particulars, and the pretrial stipulation not only informed the defendants of the charges against them, but are sufficiently clear to allow the defendants to assert double jeopardy in the event of any future prosecution for the same conduct" (Pet. App. 9a). In addition, the court rejected the contention that the district court erred in denying a motion for a more detailed bill of particulars (*ibid.*). The record fully supports the court of appeals' decision.

The indictment specifically charged that the conspirators not only coordinated general price increases but also conspired to "eliminate discounting and settle pricing disputes" in the local markets within the Middle Atlantic States in which they did business (Pet. App. 5a; J.A. M116). The bill of particulars also identified conspiratorial acts, including acts of local price fixing by individual co-conspirators (Bill of Particulars, at 3 ¶ (b), (iii)-(v) (J.A. M298)), and the grand jury materials and documents disclosed to defendants prior to trial discussed at length most,

if not all, of the local pricing disputes subsequently discussed by government witnesses at trial.[8]

Petitioners suggest that certain remarks of the prosecutor during the pretrial proceedings led them to believe that evidence of local pricing would not be admitted (see Kayo Pet. 10). In fact, the prosecutor, in opposing a motion for a postponement, simply explained that an exhaustive compilation of "every price in every station" (J.A. 15,180) was irrelevant to the defense because the Sherman Act requires a showing only of an agreement to fix prices, not price uniformity (J.A. 15,180-15,181). There was certainly no promise not to introduce local pricing evidence.[9]

Petitioners also contend (Kayo Pet. 26) that the government violated a pretrial stipulation to disclose its "intended trial exhibits" prior to trial by failing to turn over exhibits relating to local prices. This contention is without merit. Pursuant to this stipulation, 2,795 exhibits, including the defendants' pricing and telephone records, were furnished to the defendants prior to trial.[10] Not surprisingly for a

---

[8] That petitioners were not surprised by the government's introduction of evidence concerning local pricing disputes is apparent from their failure to object to the prosecutor's opening statement at trial when he clearly stated that such evidence would be presented (J.A. 167-168, see also J.A. 177, Tr. 1443). Indeed, even defense counsel referred to local pricing evidence during their opening statements (Tr. 1482-1483, 1486-1487, 1501-1502, 1509).

[9] In fact, petitioners made no objection at trial to the court's instruction that the jury could find that local pricing disputes were "resolved as a result of the conspiracy charged in the indictment" (J.A. 15,102).

[10] In addition, petitioners were provided with all grand jury testimony; access to all documents subpoenaed from or volun-

case of this size, the government was unable to anticipate fully all the exhibits it would use at trial. Moreover, many of the government's witnesses were hostile to the prosecution, and it became necessary to introduce additional documentary evidence to clarify their testimony. As a result, the district court admitted into evidence 104 government exhibits that had not previously been designated as *intended* trial exhibits. The court specifically found that the use of those exhibits did not violate the stipulation (see, *e.g.*, J.A. 223-225). Most of these exhibits related directly to instances and events that were quite familiar to petitioners by virtue of the earlier discovery,[11] and petitioners never requested a continuance to consider the

---

tarily submitted by non-defendants; all *Brady* and Jencks Act materials; and a list of intended witnesses (Pet. App. 9a). The bill of particulars for each defendant specified persons among whom the first exchanges or discussion involving the conspiracy would have taken place, as best the government could determine them (J.A. M296-M317). Where the first act of participation in the conspiracy involved the authorization or direction of a subordinate, the individuals so authorized were listed (*ibid.*). The bill of particulars also listed the dates during which each appellant participated in the conspiracy and enumerated the persons by whose act their corporate employers joined or continued participation in the conspiracy (*ibid.*).

[11] Moreover, contrary to petitioners' suggestion (Kayo Pet. 26), these exhibits did not relate solely to local pricing. Some dealt with major price restorations (see J.A. A1112, A1238-A1249, A1584, GX159-163). Others merely corroborated or clarified the testimony of government witnesses or documents already in evidence (see J.A. A1250-A1262, A1490-A1515, A1524-A1527). A number of the documents concerned defendants who were acquitted by the jury (J.A. A1117-A1121, A1179-A1181, A1250-A1258, A1494-A1514, A1524-A1526, A1592-A1595, A1597-A1603, A1728-A1730, A1734-A1738).

exhibits that had not previously been disclosed. See *United States* v. *Andrews*, 381 F.2d 377, 378 (2d Cir. 1967), cert. denied, 390 U.S. 960 (1968). Therefore, the introduction of the exhibits did not unfairly surprise petitioners.[12]

3. Petitioners also contend (Hess Pet. 12-16; Kayo Pet. 29) that they were deprived of a fair trial because the jury was prejudiced by pretrial publicity. This contention is without foundation.

Petitioners' claim is based on a single newspaper article that appeared on an inside page of a local newspaper after the close of the evidence but before the jury received its instructions. The article accurately reported the decision of another federal judge in a civil antitrust suit finding Crown Central liable for price fixing. The only mention of petitioners in the article is in the eleventh paragraph where it is noted that a Justice Department probe led to the indictment of petitioners, among others.[13]

---

[12] *United States* v. *Flom*, 558 F.2d 1179, 1185-1186 (5th Cir. 1977), on which petitioners rely (Kayo Pet. 27-28 n.28), is inapposite. In *Flom*, the prosecution had represented in its bill of particulars that it had no evidence of particular contracts and then later introduced such evidence at trial. Here, by contrast, the courts below found that the government's proof did not vary from the bill of particulars (Pet. App. 9a) and that the stipulation concerning intended trial exhibits was not violated (J.A. 223-225).

[13] The article also noted a reference by the court to the pending criminal case—that it felt the case against Crown Central had been proved by a preponderance of the evidence, "whether or not" the jury in the criminal case is convinced that it is proved beyond a reasonable doubt. This remark clearly declined to express an opinion on Crown Central's criminal culpability and, of course, made no reference at all to petitioners.

There is no possibility that this newspaper article influenced the jury's verdict. First, Crown Central itself, the only defendant with which the article was concerned, was acquitted by the jury. Moreover, after the article was brought to the district court's attention, the court asked the jury whether any of them had been exposed, even inadvertently, to "any news reports or anything of that kind * * * either about this case or about any of the parties to this case * * *" (J.A. 15,055-15,057). None of the jurors indicated that he had seen any news account.[14] In these circumstances, it is apparent that the jury was not prejudiced by the article.[15]

---

[14] The court had repeatedly instructed the jury throughout the trial that they were "not to view, read or listen to any kind of a news account concerning this case" (see, *e.g.*, J.A. 156).

[15] Petitioners argue (Hess Pet. 9-10, 15) that the manner in which the questions were asked—"has anyone advertently or inadvertently violated" the instructions concerning reading or viewing news accounts of the case (J.A. 15,056)—threatened the jurors with being held in contempt and might not have elicited a truthful response. There is no basis for this assertion. A juror certainly could have indicated he "inadvertently" read the article in question without any fear of a contempt citation, and, in fact, at an earlier point in the trial, one juror did inform the court that he had inadvertently been exposed to a news report (J.A. 3284-3287).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SANFORD M. LITVACK
Assistant Attorney General

JOHN J. POWERS, III
FREDERIC FREILICHER
Attorneys

DECEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 333761 173